



1 for rebuttal.

2       Upon review, the Court finds that the order (ECF No. 35) explicitly extending certain  
3 specified deadlines does not apply to any other unspecified deadlines, i.e., the expert deadline. In  
4 fact, the parties' prior stipulation to extend deadlines, which does not mention the need to disclose  
5 experts or the deadline for doing so, indicates that "all other deadlines" remain the same.  
6 (Stipulation, (ECF No. 22) at 4.) The deadline for disclosure of experts of February 11, 2016 was to  
7 "remain the same," as agreed by the parties, and therefore Plaintiff's disclosure of Terry Dineen on  
8 September 1, 2016 was untimely.<sup>1</sup>

9       Under Fed. R. Civ. Proc. 37(c)(1), an untimely disclosed witness may be excluded unless the  
10 failure was substantially justified or harmless. Plaintiff makes no argument that, should the Court  
11 find that the disclosure deadline was February 11, 2016, the lateness was justified. So, the only  
12 remaining question for the Court is whether the late disclosure was harmless or prejudicial.

13       Plaintiff was aware of the dispute over the expert disclosure deadline since at least September  
14 8, 2016, the date of the failed mediation, because Defendant objected to the report at the mediation,  
15 and claims the mediation was unsuccessful because of the late, unanticipated expert report  
16 disclosure. Moreover, the parties did not jointly submit an interim status report, due September 8,  
17 2016, as ordered by the Court in the scheduling order, apparently because of the disagreement  
18 regarding the expert report – Defendant filed a report which indicates that Plaintiff did not agree with  
19 Defendant's proposed interim report. (Order, (ECF No. 35) at 5.) Plaintiff's interim report also  
20 indicated that there is no pending discovery motion, but that a motion will be filed "this week" by  
21 Plaintiff. Interim Status Report (ECF No. 41), at 2, 3. Plaintiff never filed her own interim status  
22 report, which the Court construes as a tacit agreement that Defendant's report was accurate, i.e., that  
23 a motion would be filed to resolve the dispute. Plaintiff filed the present motion on December 28,

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25       <sup>1</sup> The Dineen expert report was an exhibit to Plaintiff's mediation brief which was provided to  
26 Defendant a few days before the mediation. Defendant argues that the report has not yet been properly disclosed,  
27 that the mediation brief is confidential, and therefore it would not be admissible at trial. Rule 26 simply requires  
28 that the report be disclosed in a timely fashion, and the Court finds that the method of disclosure itself is not  
objectionable. Plaintiff has clearly waived confidentiality of the report by disclosing it to Defendant.

1 2016, nearly four months after the dispute arose, nearly two months after the close of discovery, and  
2 only one week before the dispositive motions deadline. According to Defendant, Plaintiff did not  
3 discuss the issue of the expert report again between September 8, 2016 until the filing of the present  
4 motion. Plaintiff provides no explanation for why she waited so long to file the present motion – had  
5 the motion been filed as discussed, several months of discovery remained. Plaintiff’s failure to act  
6 had a significant impact on the proceedings – it led Defendant to proceed under the reasonable  
7 assumption that it did not need to produce a rebuttal expert or conduct further discovery to defend  
8 against future vocational losses, and the discovery period closed. Although Plaintiff argues that any  
9 prejudice to Defendants could be cured by reopening discovery, the court finds that in this case,  
10 reopening discovery neglects the overarching purpose in administering the Federal Rules of Civil  
11 Procedure, “to secure the just, speedy, and inexpensive determination of every action.” Fed. R. Civ.  
12 P. 1. Discovery is expensive, and reopening discovery would require Defendant to hire an expert or  
13 rebuttal expert and conduct additional fact discovery in light of the late report – essentially restarting  
14 discovery that had already closed. The Court finds that Plaintiff’s failure to bring a motion or inform  
15 the Court of the dispute until long after the discovery period lapsed prejudiced Defendant.

16 Prior to awarding preclusion sanctions, the Court has considered the public’s interest in  
17 expeditious resolution of litigation, the court’s need to manage its docket, and the prejudice suffered  
18 by Defendant, all of which favor preclusion. The Court has also considered the availability of less  
19 drastic sanctions, which Plaintiff argues is the reopening of discovery, and finds that on balance that  
20 preclusion is appropriate because of the additional expense visited upon Defendant by reopening  
21 discovery. Moreover, the preclusion of the Mr. Dineen as an expert does not prevent Plaintiff from  
22 offering otherwise admissible, relevant evidence regarding Plaintiff’s vocational losses.

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1 IT IS THEREFORE ORDERED that Plaintiff's motion for clarification (ECF No. 46) is  
2 GRANTED in part. The Court finds that the deadline for expert disclosure in this case was February  
3 11, 2016. In accordance with that finding, Plaintiff's disclosure of expert witness Terry Dineen is  
4 untimely and prejudicial. Therefore, the witness is excluded from evidence.

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6 DATED: January 24, 2017.

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9 C.W. Hoffman, Jr.  
United States Magistrate Judge